

(S E R V F D)
(JULY 24, 1987)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

46 CFR Part 502

[Docket No. 87-7]

**IMPLEMENTATION OF THE EQUAL ACCESS TO JUSTICE ACT
IN COMMISSION PROCEEDINGS**

AGENCY: Federal Maritime Commission.

ACTION: Final rule.

SUMMARY: This rule implements the Equal Access to Justice Act, as revised, and provides for the award of attorney fees and other expenses to certain parties who prevail over the Federal Government in certain proceedings before the Commission.

EFFECTIVE DATE: (30 days after publication in the Federal Register.)

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION: The Equal Access to Justice Act ("EAJA"), Pub. L. No. 96-481, 94 Stat. 2325, was reauthorized and amended by Pub. L. No. 99-80, 99 Stat. 183, on August 5, 1985. "Model Rules" implementing EAJA were promulgated on May 6, 1986 by the Administrative Conference of the United States ("ACUS"). 51 FR 16659 (May 6, 1986). The EAJA and the Model Rules provide for the award of attorney fees and other expenses to certain parties who prevail over the Federal Government in certain administrative proceedings.

On April 15, 1987, the Federal Maritime Commission ("Commission" or "FMC") published a proposed rule (52 FR 12208) to implement the EAJA and track the Model Rules.¹ Two comments on the proposed rules were received.

The Asia North America Eastbound Rate Agreement ("ANERA") suggests that the rule be clarified to take account of the unique nature of the parties regularly appearing before the Commission. Specifically, ANERA proposes that the rule include the term "conferences" as an eligible applicant referenced in section 502.501(d)(2)(v), which now reads:

(v) Any other partnership, corporation, association, unit of local government, or organization with a net worth of not more than \$7 million and not more than 500 employees.

The Commission agrees with ANERA that "conferences" are "associations" within the meaning of section 502.501(d)(2)(v) and could be eligible for an award of attorney fees and other expenses under the EAJA and this rule, if other requirements are met. At the same time, however, the Commission believes that it is not necessary to add a specific provision in the final rule to so provide. See section 3(7) of the Shipping Act of 1984, 46 U.S.C. app. 1702(7). There are other unique entities which have been or could be parties to Commission proceedings and which could be eligible applicants under this rule, such as a "joint service," which might be an association, corporation or partnership. The Commission cannot here list every potential type of party to its proceedings but, when questions arise, will rely on the generic language of section 502.501(d)(2)(v).

¹ The Commission recently published a final rule, effective on April 2, 1987, which governs the award of attorney fees in certain reparation proceedings under section 11 of the Shipping Act of 1984, 46 U.S.C. app. 1710. See Attorney's Fees in Reparation Proceedings, Docket No. 86-27, 52 FR 6330 (March 3, 1986).

ACUS noted that the FMC's proposed rule follows closely its Model Rules and that the departures from the Model Rules "appear to be sensible adaptations of the model to the specific requirements of Federal Maritime Commission practice." However, ACUS further comments:

Both the summary and preamble of your document [proposed rules] appear to state that the rules apply to the award of attorney fees to parties who prevail over the government in court proceedings (although the rules themselves do not state this). Since, under 28 U.S.C. 2812(d)(3), the courts themselves are to make EAJA awards in cases before them, the only part of these rules that might apply to court proceedings would be the provision for payment of awards by the agency [section 502.503(j)]. You may wish to note this in the document publishing your final rules, in order to avoid any confusion.

The Commission notes and adopts ACUS' suggested clarification, which does not go to the rule itself, but to language in the Summary and Supplementary Information which accompanied the rule. If there is any type of court proceeding, such as for enforcement of a subpoena under 46 U.S.C. app. 1713(c), which might be "in connection with" a Commission adjudication under 5 U.S.C. 504(a)(1), and, at the same time, may not be covered by 28 U.S.C. 2812(d)(3), the rule, at section 502.501(c)(2), provides a vehicle for addressing that situation on a case-by-case basis.

Accordingly, the Commission adopts the proposed rule as final, without change.

This rule is not a "major rule" for the purposes of Executive Order 12291 of February 27, 1981. As required by the Regulatory Flexibility Act, it is hereby certified that this rule will not have a significant impact on small business entities.

List of subjects in 46 CFR, Part 502:

Administrative practice and procedure.

Therefore, for the foregoing reasons, Part 502 of Title 46 of the Code of Federal Regulations is amended as follows:

1. The Authority Citation for Part 502 is revised to read as follows:

Authority: 5 U.S.C. 504, 551, 552, 553, 559; 12 U.S.C. 1141j(a); 18 U.S.C. 207; 26 U.S.C. 501(c)(3); 46 U.S.C. app. 817, 820, 821, 826, 841a, 1114(b), 1705, 1707-1711, 1713-1716; and E.O. 11222 of May 8, 1965 (30 FR 6469).

2. Paragraph (a) of § 502.74 is revised to read as follows:

§ 502.74 Replies to pleadings, motions, applications, etc.

(a)(1) Except as provided under Subpart V of this part, a reply to a reply is not permitted.

(2) Except as otherwise provided respecting answers (§ 502.64), shortened procedure (subpart K of this part), briefs (§ 502.221), exceptions (§ 502.227), replies to petitions for attorney fees under the Equal Access to Justice Act (§ 502.503(b)(1)), and the documents specified in paragraph (b) of this section, any party may file and serve a reply to any written motion, pleading, petition, application, etc., permitted under this part within fifteen (15) days after the date of service thereof, unless a shorter period is fixed under § 502.103.

* * * * *

3. Subpart V, containing § 502.991, is redesignated as "Subpart W".

4. A new Subpart V is added to read as follows:

**SUBPART V - IMPLEMENTATION OF THE
EQUAL ACCESS TO JUSTICE ACT IN COMMISSION PROCEEDINGS**

Section

- 502.501 General Provisions.
- 502.502 Information Required From Applicants.
- 502.503 Procedures for Considering Applications.

§ 502.501 General Provisions.

(a) **Purpose.** The Equal Access to Justice Act, 5 U.S.C. 504 ["EAJA"], provides for the award of attorney fees and other expenses to eligible individuals and entities who are parties to certain administrative proceedings [called "adversary adjudications"] before the Federal Maritime Commission ["the Commission"]. An eligible party may receive an award when it prevails over an agency, unless the agency's position was substantially justified or special circumstances make an award unjust. The rules in this subpart describe the parties eligible for awards and the proceedings that are covered. They also explain how to apply for awards, and the procedures and standards that the Commission will use to make them.

(b) **When EAJA applies.** EAJA applies to any adversary adjudication:

(1) Pending or commenced before the Commission on or after August 5, 1985;

(2) Commenced on or after October 1, 1984, and finally disposed of before August 5, 1985, provided that an application for fees and expenses, as described in § 502.502 of this subpart, has been filed with the Commission within 30 days after August 5, 1985; or

(3) Pending on or commenced on or after October 1, 1981, in which an application for fees and other expenses was timely filed and was dismissed for lack of jurisdiction.

(c) Proceedings covered.

(1)(i) EAJA applies to adversary adjudications conducted by the Commission under this part. These are adjudications under 5 U.S.C. 554 in which the position of this or any other agency of the United States, or any component of any agency, is presented by an attorney or other representative who enters an appearance and participates in the proceeding.

(ii) Any proceeding in which the Commission may prescribe a lawful present or future rate is not covered by the Act.

(iii) Proceedings to grant or renew licenses are also excluded, but proceedings to modify, suspend, or revoke licenses are covered if they are otherwise "adversary adjudications."

(2) The Commission's failure to identify a type of proceeding as an adversary adjudication shall not preclude the filing of an application by a party who believes the proceeding is covered by the EAJA; whether the proceeding is covered will then be an issue for resolution in proceedings on the application.

(3) If a proceeding includes both matters covered by EAJA and matters specifically excluded from coverage, any award made will include only fees and expenses related to covered issues.

(d) Eligibility of applicants.

(1) To be eligible for an award of attorney fees and other expenses under EAJA, the applicant must be a party to the adversary adjudication for which it seeks an award. The term "party" is defined in 5 U.S.C. 551(3). The applicant must show that it meets all conditions of eligibility set out in this section and § 502.502.

(2) The types of eligible applicants are:

(i) An individual with a net worth of not more than \$2 million;

(ii) The sole owner of an unincorporated business who has a net worth of not more than \$7 million, including both personal and business interests, and not more than 500 employees;

(iii) A charitable or other tax-exempt organization described in section 501(c)(3) of the Internal Revenue Code [26 U.S.C. 501(c)(3)] with not more than 500 employees;

(iv) A cooperative association as defined in section 15(a) of the Agricultural Marketing Act [12 U.S.C. 1141j(a)] with not more than 500 employees; and

(v) Any other partnership, corporation, association, unit of local government, or organization with a net worth of not more than \$7 million and not more than 500 employees.

(3) For the purpose of eligibility, the net worth and number of employees of an applicant shall be determined as of the date the proceeding was initiated.

(4) An applicant who owns an unincorporated business will be considered as an "individual" rather than a "sole owner of an unincorporated business" if the issues on which the applicant prevails are related primarily to personal interests rather than to business interests.

(5) The employees of an applicant include all persons who regularly perform services for remuneration for the applicant, under the applicant's direction and control. Part-time employees shall be included on a proportional basis.

(6) The net worth and number of employees of the applicant and all of its affiliates shall be aggregated to determine eligibility. Any individual corporation or other entity that directly or indirectly controls or owns a

majority of the voting shares or other interests of the applicant, or any corporation or other entity of which the applicant directly or indirectly owns or controls a majority of the voting shares or other interests, will be considered an affiliate for purposes of this subpart, unless the adjudicative officer determines that such treatment would be unjust and contrary to the purposes of EAJA in light of the actual relationship between the affiliated entities. In addition, the adjudicative officer may determine that financial relationships of the applicant other than those described in this paragraph constitute special circumstances that would make an award unjust.

(7) An applicant that participates in a proceeding primarily on behalf of one or more other persons or entities that would be ineligible is not itself eligible for an award.

(e) Standards for awards.

(1) A prevailing applicant may receive an award for fees and expenses incurred in connection with a proceeding or in a significant and discrete substantive portion of the proceeding, unless the position of the agency over which the applicant has prevailed was substantially justified. The position of the agency includes, in addition to the position taken by the agency in the adversary adjudication, the action or failure to act by the agency upon which the adversary adjudication is based. The burden of proof that an award should not be made to an eligible prevailing applicant is on agency counsel.

(2) An award will be reduced or denied if the applicant has unduly or unreasonably protracted the proceeding or if special circumstances make the award sought unjust.

(f) Allowable fees and expenses.

(1) Awards will be based on rates customarily charged by the persons engaged in the business of acting as attorneys, agents and expert witnesses, even if the services were made available without charge or at a reduced rate to the applicant.

(2) No award for the fee of an attorney or agent under this subpart may exceed \$75.00 per hour. No award to compensate an expert witness may exceed the highest rate at which the Commission pays expert witnesses. However, an award may also include the reasonable expenses of the attorney, agent, or witness as a separate item, if the attorney, agent or witness ordinarily charges clients separately for such expenses.

(3) In determining the reasonableness of the fee sought for an attorney, agent or expert witness, the adjudicative officer shall consider the following:

(i) If the attorney, agent or witness is in private practice, his or her customary fees for similar services, or, if an employee of the applicant, the fully allocated costs of the services;

(ii) The prevailing rate for similar services in the community in which the attorney, agent or witness ordinarily performs services;

(iii) The time actually spent in the representation of the applicant;

(iv) The time reasonably spent in light of the difficulty or complexity of the issues in the proceeding; and

(v) Such other factors as may bear on the value of the services provided.

(4) The reasonable cost of any study, analysis, engineering report, test project or similar matter prepared

on behalf of a party may be awarded, to the extent that the charge for the services does not exceed the prevailing rate for similar services, and the study or other matter was necessary for preparation of applicant's case.

(g) Awards against other agencies.

If an applicant is entitled to an award because it prevails over another agency of the United States that participates in a proceeding before the Commission and takes a position that is not substantially justified, the award or an appropriate portion of the award shall be made against that agency.

§ 502.502 Information required from applicants.

(a) Contents of petition.

(1) An application for an award of fees and expenses under EAJA shall be by petition under § 502.69 of this part, shall clearly indicate that the application is made under EAJA, and shall identify the applicant and the proceeding (including docket number) for which an award is sought. The application shall show that the applicant has prevailed and identify the position of an agency or agencies that the applicant alleges was not substantially justified. Unless the applicant is an individual, the application shall also state the number of employees of the applicant and describe briefly the type and purpose of its organization or business.

(2) The petition shall also include a statement that the applicant's net worth does not exceed \$2 million [if an individual] or \$7 million [for all other applicants, including their affiliates]. However, an applicant may omit this statement if:

(i) It attaches a copy of a ruling by the Internal Revenue Service that it qualifies as an organization described in section 501(c)(3) of the Internal Revenue Code [26 U.S.C. 501(c)(3)] or, in the case of a tax-exempt

organization not required to obtain a ruling from the Internal Revenue Service on its exempt status, a statement that describes the basis for the applicant's belief that it qualifies under such section; or

(ii) It states that it is a cooperative association as defined in section 15(a) of the Agricultural Marketing Act [12 U.S.C. 1141j(a)].

(3) The petition shall state the amount of fees and expenses for which an award is sought.

(4) The petition may also include any other matters that the applicant wishes the Commission to consider in determining whether and in what amount an award should be made.

(5) The petition shall be signed by the applicant or an authorized officer or attorney of the applicant. It shall also contain or be accompanied by a written verification under oath or under penalty of perjury that the information provided in the application is true and correct.

(b) Net worth exhibit.

(1) Each applicant except a qualified tax-exempt organization or cooperative association must provide with its petition a detailed exhibit showing the net worth of the applicant and any affiliates [as defined in § 502.501(d)(6) of this subpart] when the proceeding was initiated. The exhibit may be in any form convenient to the applicant that provides full disclosure of the applicant's and its affiliates' assets and liabilities and is sufficient to determine whether the applicant qualifies under the standards in this subpart. The adjudicative officer may require an applicant to file additional information to determine its eligibility for an award.

(2) Ordinarily, the net worth exhibit will be included in the public record of the proceeding. However, an applicant that objects to public disclosure of information

in any portion of the exhibit and believes there are legal grounds for withholding it from disclosure may submit that portion of the exhibit directly to the adjudicative officer in a sealed envelope labeled "Confidential Financial Information," accompanied by a motion to withhold the information from public disclosure. The motion shall describe the information sought to be withheld and explain, in detail, why it falls within one or more of the specific exemptions from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 552(b)(1)-(9), why public disclosure of the information would adversely affect the applicant, and why disclosure is not required in the public interest. The material in question shall be served on counsel representing the agency against which the applicant seeks an award, but need not be served on any other party to the proceeding. If the adjudicative officer finds that the information should not be withheld from disclosure, it shall be placed in the public record of the proceeding. Otherwise, any request to inspect or copy the exhibit shall be disposed of in accordance with the Commission's established procedures under the Freedom of Information Act under §§ 503.31 - 503.43 of this chapter.

(c) Documentation of fees and expenses.

The petition shall be accompanied by full documentation of the fees and expenses, including the cost of any study, analysis, engineering report, test, project or similar matter, for which an award is sought. A separate itemized statement shall be submitted for each professional firm or individual whose services are covered by the application, showing the hours spent in connection with the proceeding by each individual, a description of the specific services performed, the rates at which each fee has been computed, any expenses for which reimbursement is sought, the total amount claimed, and the total amount paid or payable by the applicant or by any other person or entity for the services

provided. The adjudicative officer may require the applicant to provide vouchers, receipts, or other substantiation for any expenses claimed.

(d) When a petition may be filed.

(1) A petition may be filed whenever the applicant has prevailed in the proceeding or in a significant and discrete substantive portion of the proceeding, but in no case later than 30 days after the Commission's final disposition of the proceeding.

(2) For purposes of this subpart, final disposition means the date on which a decision or order disposing of the merits of the proceeding or any other complete resolution of the proceeding, such as a settlement or voluntary dismissal, becomes final and unappealable, both within the Commission and to the courts.

(3) If review or reconsideration is sought or taken of a decision as to which an applicant believes it has prevailed, proceedings for the award of fees shall be stayed pending final disposition of the underlying controversy. When the United States appeals the underlying merits of an adversary adjudication to a court, no decision on an application for fees and other expenses in connection with that adversary adjudication shall be made until a final and unreviewable decision is rendered by the court on the appeal or until the underlying merits of the case have been finally determined pursuant to the appeal.

§ 502.503 Procedures for considering petitions.

(a) Filing and service of documents.

(1) Any petition for an award or other pleading or document related to a petition shall be filed and served on all parties to the proceeding in the same manner as other pleadings in the proceeding, except as provided in § 502.502(b)(2) (confidential financial information).

(2) The petition and all other pleadings or documents related to the petition will be referred to an Administrative Law Judge to initially decide the matter as adjudicative officer.

(b) Reply to petition.

(1) Within 30 days after service of a petition, counsel representing the agency against which an award is sought may file a reply to the petition. Unless counsel requests an extension of time for filing or files a statement of intent to negotiate under paragraph (b)(2) of this section, failure to file a reply within the 30-day period may be treated as a consent to the award requested.

(2) If agency counsel and the applicant believe that the issues in the fee application can be settled, they may jointly file a statement of their intent to negotiate a settlement. The filing of this statement shall extend the time for filing a reply for an additional 30 days, and further extension may be granted by the adjudicative officer upon request by agency counsel and the applicant.

(3) The reply shall explain in detail any objections to the award requested and identify the facts relied on in support of counsel's position. If the reply is based on any alleged facts not already in the record of the proceeding, agency counsel shall include with the reply either supporting affidavits or a request for further proceedings under paragraph (f) of this section.

(c) Response to reply.

Within 15 days after service of a reply, the applicant may file a response. If the response is based on any alleged facts not already in the record of the proceeding, the applicant shall include with the response either supporting affidavits or a request for further proceedings under paragraph (f) of this section.

(d) Comments by other parties.

Any party to a proceeding other than the applicant and agency counsel may file comments on an application within 30 days after it is served, or on a reply, within 15 days after it is served. A commenting party may not participate further in proceedings on the application unless the adjudicative officer determines that the public interest requires such participation in order to permit full exploration of matters raised in the comments.

(e) Settlement.

The applicant and agency counsel may agree on a proposed settlement of the award before final action on the application, either in connection with a settlement of the underlying proceeding, or after the underlying proceeding has been concluded in accordance with the rules of this subpart pertaining to settlement. If a prevailing party and agency counsel agree on a proposed settlement of an award before a petition is filed, the petition shall be filed with the proposed settlement.

(f) Further proceedings.

(1) Ordinarily, the determination of an award will be made on the basis of the written record. However, on request of either the applicant or agency counsel, or on his or her own initiative, the adjudicative officer may order further proceedings, such as an informal conference, oral argument, additional written submissions or, as to issues other than substantial justification (such as the applicant's eligibility or substantiation of fees and expenses), pertinent discovery or an evidentiary hearing. Such further proceedings shall be held only when necessary for full and fair resolution of the issues arising from the application, and shall be conducted as promptly as possible. Whether or not the position of the agency was substantially justified shall be determined on the basis of the

administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

(2) A request that the adjudicative officer order further proceedings under this section shall specifically identify the information sought or the disputed issues and shall explain why the additional proceedings are necessary to resolve the issues.

(g) Decision.

The adjudicative officer shall serve an initial decision on the application within 60 days after completion of proceedings on the application. The decision shall include written findings and conclusions on the applicant's eligibility and status as a prevailing party, and an explanation of the reasons for any difference between the amount requested and the amount awarded. The decision shall also include, if at issue, findings on whether the agency's position was substantially justified, whether the applicant unduly protracted the proceedings, or whether special circumstances make an award unjust. If the applicant has sought an award against more than one agency, the decision shall allocate responsibility for payment of any award made among the agencies, and shall explain the reason for the allocation made.

(h) Commission review.

Either the applicant or agency counsel may seek review of the initial decision on the fee application, or the Commission may decide to review the decision on its own initiative, in accordance with § 502.227 of this part. If neither the applicant nor agency counsel seeks review and the Commission does not take review on its own initiative, the initial decision on the application shall become a final decision of the Commission 30 days after it is issued. Whether to review a decision is a matter within the

discretion of the Commission. If review is taken, the Commission will issue a final decision on the application or remand the application to the adjudicative officer for further proceedings.

(i) Judicial review.

Judicial review of final Commission decisions on awards may be sought as provided in 5 U.S.C. 504(c)(2).

(j) Payment of award.

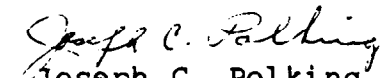
(1) (i) An applicant seeking payment of an award shall submit to the comptroller or other disbursing officer of the paying agency a copy of the Commission's final decision granting the award, accompanied by a certification that the applicant will not seek review of the decision in the United States courts.

(ii) The agency will pay the amount awarded to the applicant within 60 days.

(2) Where the Federal Maritime Commission is the paying agency, the application for payment of award shall be submitted to:

Office of Budget and Financial Management
Federal Maritime Commission
Washington, DC 20573.

By the Commission.


Joseph C. Polking
Secretary